ADDRESSING THE ISSUE IN *HARVEY V UMHLATUZE MUNICIPALITY* IN LEGISLATION

BV Slade
BComm LLB LLM LLD
Senior Lecturer, Faculty of Law, University of Stellenbosch*

1 Introduction

In *Harvey v Umhlatuze Municipality*[1] ("*Harvey*") the High Court had to decide whether it was competent to order the re-transfer of expropriated property to the previous owner when the purpose for which the property was expropriated could not be realised. In this decision the applicant's property was expropriated for purposes of creating a recreational open space and conservation area for general use by the public, but when that purpose could not be realised the municipality decided to change the use of the property. The new purpose involved the sale of the land on tender to a private developer for the erection of residential houses. The applicant argued that the first respondent had an obligation to award him restitution of his former property – against payment of the market value – since the first respondent abandoned its plan to use the property for the original purpose.[2]

Since there is no legislative authority for this proposition in South African law the applicant relied on a particular interpretation of the public purpose requirement in section 25(2) of the Constitution of the Republic of South Africa, 1996 ("the Constitution"), based on authority in German law. The applicant argued that when the public purpose falls away, becomes impossible, or is changed, the expropriation is no longer "legally and constitutionally sustainable in the face of a claim to the property by the original owner".[3] To substantiate this claim, the applicant relied on an argument made by Van der Walt.[4] Relying on German law,[5] Van der Walt states that if property was "expropriated for a public purpose that was never realised (or for a purpose that ceased to exist)",[6] the property should be returned to the previous owner,

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1 2011 1 SA 601 (KZP).

2 Para 80.

3 Para 80.

4 AJ van der Walt *Constitutional Property Law* (2005) 256. In AJ van der Walt *Constitutional Property Law* 3 ed (2011) 493-499, this argument was retained and expanded with reference to *Harvey v Umhlatuze Municipality* 2011 1 SA 601 (KZP) and the Malaysian decision of *United Development Company Sdn Bhd v The State Government of Sabah* [2011] MLJ 209.

5 *BVerfGE* 38, 175 [1974], *BVerfGE* 56, 249 [1981] (*Dürkheimer Gondelbahn*); *BVerfGE* 97, 89 [1997].

6 Van der Walt *Constitutional Property Law* (2005) 256; Van der Walt *Constitutional Property Law* (2011) 494.

even if compensation was paid.[7] Therefore, if the public purpose falls away, the state is no longer justified in retaining the property. However, a notable difference in German law is the fact that German legislation specifically provides for the re-transfer of previously expropriated property upon non-realisation of the public purpose and often provides for the amount that the previous owner has to repay in such an event.[8] In the absence of legislation German courts have held that this principle of re-transfer is implied in the property guarantee in article 14 of the Basic Law of 1949.[9] Since there is no equivalent doctrine or comparable legislation in South African law, the court in *Harvey* was not willing to order the re-transfer.[10] Therefore, due to the absence of a legislative basis on which the court could grant the order of re-transfer the court rejected the applicant's argument.

The *Harvey* decision received some attention in academic literature. Du Plessis, in pointing out flaws in the court's logic, argues that the state only acquires conditional ownership when it expropriates property and that "the ownership remains conditional on the public purpose being fulfilled".[11] In this regard, and based on German law, Du Plessis argues that it should be possible – in the absence of specific legislation – to succeed with a claim for re-transfer based directly on the protective function of section 25.[12] Sonnekus and Pleysier argue that the classification of the expropriated property to *res publicae* should be subject to a suspensive condition meaning that the property is capable of being reclaimed through the *rei vindicatio* by the previous owner until such time that the public purpose for which the property was expropriated is realised.[13] Van der Walt and Slade argue that even though one can have sympathy with the High Court for refusing to order the re-transfer of expropriated property upon non-realisation of the public purpose, the court

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7 See further R Wendt "Eigentum, Erbrecht und Enteigung" in M Sachs (ed) *Grundgesetz Kommentar* 4 ed (2007) 582 629 para 165.

8 For instance, legislation such as the German Federal Building Code (*Bundesbaugesetz* 1960), amongst others, specifically provides for "re-expropriation". See *Harvey v Umhlatuze Municipality* 2011 1 SA 601 (KZP) paras 129-131; E du Plessis "Restitution of Expropriated Property upon Non-realisation of the Public Purpose" (2011) *TSAR* 579 588-589. See also JC Sonnekus & AJH Pleysier "Eiendomsverwerwing of –verlies onder `n Tydsbepaling of `n Voorwaarde en die Privaatregtelike Implikasies vir Onteiening (Deel 2)" (2011) *TSAR* 601 613-619.

9 *BVerfGE* 38, 175 [1974]; *Harvey v Umhlatuze Municipality* 2011 1 SA 601 (KZP) para 97. See also DP Currie *The Constitution of the Republic of Germany* (1994) 293-294; AJ van der Walt *Constitutional Property Clauses: A Comparative Analysis* (1999) 149; Du Plessis (2011) *TSAR* 589; AJ van der Walt & BV Slade "Public Purpose and Changing Circumstances: *Harvey v Umhlatuze Municipality and Others* 2011 (1) SA 601 (KZP)" (2012) 129 *SALJ* 219 220.

10 *Harvey v Umhlatuze Municipality* 2011 1 SA 601 (KZP) para 134. The High Court relied on the Constitutional Court's decision in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) para 97, where the Court held that foreign law cannot by "simplistic transference" determine the proper interpretation of the South African Bill of Rights. See also Du Plessis (2011) *TSAR* 582.

11 Du Plessis (2011) *TSAR* 592.

12 592.

13 Sonnekus & Pleysier (2011) *TSAR* 610-613. The authors argue that the expropriation is not yet completed, in other words the state has not yet obtained "ownership" of the property, until the purpose for which the property is expropriated has been realised.

should have considered whether the new changed purpose is also a valid public purpose or in the public interest.[14]

It has already been stated that there is no legislative basis on which a claim for re-transfer of expropriated property upon non-realisation of the public purpose could be founded on. Van der Walt and Slade submit that either the Expropriation Act 63 of 1975 should be amended or legislation similar to that which exists in German law should be promulgated in order to regulate this matter.[15]

In March 2013 a Draft Expropriation Bill was released for public comment.[16] The purpose of the Bill is to "align the Expropriation Act with the Constitution and to provide a common framework to guide the processes and procedures for the expropriation of property by organs of state".[17] The aim of this note is to point out that the Expropriation Bill, if passed into law, fails to address the *Harvey* scenario adequately although it allows for previous owners to repurchase previously expropriated property upon non-realisation of the public purpose in very limited circumstances.

2 Section 4 of the 2013 Draft Expropriation Bill

Section 4 of the Bill deals with the situation where the Minister of Public Works expropriates property on behalf of juristic persons who need the property to fulfil a public purpose. A similar provision is also contained in section 3 of the current Expropriation Act, but is expanded in the Bill to provide for situations where the juristic person is unable to implement or realise the public purpose. Effectively, section 4 of the Bill would enable an owner whose property was expropriated by the Minister of Public Works on behalf of a juristic person to be able to take re-transfer of his property, but only in very limited circumstances.

Section 4(1) of the Bill states that the Minister of Public Works may expropriate property on behalf of a juristic person if the juristic person requires the property for a public purpose or in the public interest; could not reach an agreement for sale of the property with the owner;[18] would be able to give effect to the purpose for which the property is required; and accepts in writing the conditions imposed by the Minister.[19] The conditions placed

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14 Van der Walt & Slade (2012) *SALJ* 219-235. See also Van der Walt *Constitutional Property Law* (2011) 497, 499.

15 Van der Walt & Slade (2012) *SALJ* 235. See also Van der Walt *Constitutional Property Law* (2011) 499.

16 Expropriation Bill 2013 (draft) GN 234 in *GG* 36269 of 20-03-2013 ("the Expropriation Bill") (released for public comment 15-03-2013).

17 Explanatory memorandum on the Expropriation Bill.

18 This effectively means that expropriation of the property would not be possible if a less drastic means (such as concluding a contract of sale for the property or purchasing alternative property on the open market) would have been sufficient to realise the purpose for which expropriation is sought. On the less invasive means argument, see BV Slade "The Less Invasive Means Argument in Expropriation Law" (2013) *TSAR* 199-216.

19 Unlike s 3 of the Expropriation Act, "juristic person" is not given further content in s 4 of the Bill. In s 3 of the Expropriation Act a juristic person includes, amongst others, universities and technikons. However, a broader definition of a juristic person is included in s 1 of the Bill to include "a juristic person established in terms of law and who accounts for the management of its finances in terms of the Public Finance Management Act, 1999 or the Local Government: Municipal Finance Management Act, 2003".

on the juristic persons in terms of section 4(3) of the Bill are to be welcomed, although the proper application of the conditions is not entirely clear.

Section 4(3)(a) of the Bill states that "the juristic person must give effect to the purpose for which the property was expropriated within the time frame determined by the Minister".[20] It can be assumed that the time frame given by the Minister would depend on the purpose for which the property was expropriated and would therefore depend on the specific circumstances of each expropriation.[21] The juristic person is further compelled to use the property only for the purpose for which it was expropriated.[22] It has been argued that in terms of the constitutional requirements for a valid expropriation, expropriated property may only ever be used for the purpose for which it was expropriated.[23] Nevertheless, the confirmation of this position in the Bill in this, however limited, regard should be welcomed.

The Bill also implicitly recognises that circumstances may change to such an extent that the initial purpose becomes unrealisable. As a result, the Bill requires that written permission must be obtained from the Minister if the property is to be used for a different purpose, but on condition that the changed purpose must also be a public purpose or in the public interest.[24] This condition raises several issues. The Bill as it stands creates the impression that the Minister decides whether or not the new purpose is a valid public purpose or in the public interest. If the Minister decides whether or not the changed purpose is also a valid public purpose or in the public interest, what is the chance that the new purpose would be tested by a court or that the Minister's decision to approve the change would be reviewed in terms of administrative law?[25] It is doubtful that the juristic person would make a claim based on the fact that the new purpose is not a valid public purpose or in the public interest, since from the structure of the section it seems as if the juristic person has to approach the Minister to have the purpose changed in the first place.[26] The previous owner would probably not be interested in approaching a court to either test the new purpose against the constitutional requirements or review the Minister's decision to change the purpose. Firstly, the *Harvey* decision stands in the way of such a claim and secondly, the Bill does not address the *Harvey* issue, but only allows for repurchase of the property by the previous owner in very limited circumstances as is indicated below.

Section 4(3)(c) states that the juristic person must transfer ownership to the state if it (the juristic person) fails to implement the purpose within the time

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[20] S 4(3)(a) of the Bill.

[21] However, see the argument below in part 3 concerning a general time frame for completion of the public purpose set by legislation.

[22] S 4(3)(b) of the Bill.

[23] Van der Walt & Slade (2012) *SALJ* 235; Du Plessis (2011) *TSAR* 590-592.

[24] S 4(3)(b) of the Bill. The Bill does not explicitly state whether the Minister must set a time frame for realisation of the public purpose when a change in purpose has been approved. However, it can be assumed that when the Minister approves in writing a change in purpose he will also determine the time frame within which the changed purpose must be realised as indicated in s 4(3)(a) of the Bill.

[25] Van der Walt & Slade (2012) *SALJ* 234 point out that the courts should be in a position to test the new purpose against the constitutional requirements to ensure that the expropriation remains valid.

[26] However, the juristic person will probably approach a court to review the Minister's decision if the Minister denies the change in purpose as requested by the juristic person.

frame determined by the Minister or if the juristic person continues to use the property – contrary to the Minister's written instruction – for a purpose "other than for which the property is expropriated" or for the changed purpose as agreed to with the Minister in terms of section 4(3)(b). In this regard the state, and not the previous owner, would be able to take re-transfer of the expropriated property under these specific circumstances. The Bill also gives the national government, and not the previous owner, the right of first refusal if the juristic person decides to alienate the property.[27]

When the purpose could not be realised within the allotted time frame and the state has acquired ownership of the expropriated property in terms of section 4(3)(c), it has 180 days to decide whether or not to retain the property.[28] If the Minister of Public Works decides to retain the property the Bill prescribes certain formalities that have to be complied with, such as compensating the juristic person for certain expenses.[29] However, if the Minister decides not to retain the property and dispose of it the expropriated owner *may*, not must, be given the right of first refusal to purchase the property at the current market value.[30]

Therefore, it is only in this isolated instance where the previous owner may be given the right to purchase the expropriated property at the current market value when the purpose for the expropriation could not be realised. As a result, the former owner would only receive the option to repurchase his previously expropriated property if the property was expropriated on behalf of a juristic person and that juristic person could not realise the original public purpose or the changed purpose for which permission was received and the property was transferred to the state and the state then decides to dispose of the property. Only in these circumstances may the owner be given the right to repurchase the property at the current market value. This provision does not resolve the issue that was present in the *Harvey* decision. In that decision the property was not expropriated on behalf of a juristic person, but was acquired by the state for a specific public use. In other words, after expropriation took effect the property remained in "ownership" of the state, which means that section 4 of the Bill and the re-transfer of property upon non-realisation of the public purpose would not apply.

3 Addressing the *Harvey* issue in legislation

Since there is no legislation that can regulate the re-transfer of property upon the non-realisation of the public purpose apart from the isolated instance in the Expropriation Bill as explained above, certain recommendations are made here that should resolve the *Harvey* issue. Provision should be made in the Bill for mechanisms through which previous owners can reclaim their previously expropriated property in certain situations and to allow the courts to oversee this process if the need arises. The main objective of the amending provisions

27 S 4(3)(e) of the Bill.
28 S 4(11).
29 S 4(12)(a).
30 S 4(12)(c).

should be to indicate the nature of this right of re-transfer, the persons entitled to claim re-transfer, the time-frame within which the expropriated owner can reclaim the property upon non-implementation of the purpose, setting up a framework for calculating the amount that has to be repaid, as well as the circumstances under which the state would not be required to re-transfer the property to the previous owner.

In English law there are rules that regulate the position when compulsory acquired property becomes surplus, in other words when it is no longer needed for the purpose for which it was acquired. In terms of the Crichel Down Rules certain government departments are required to offer back compulsorily acquired property or property sold under the threat of compulsory acquisition to the former owners or their successors in title when the property is no longer needed for the purpose for which it was acquired.[31] In terms of the Circular on Compulsory Purchase and the Crichel Down Rules, the rules are non-statutory and therefore, not compulsory.[32] However, it is assumed that these rules should apply in a mandatory manner by certain departments.[33] The general rule is located in paragraph 10 to the Circular:

> "Where a department wishes to dispose of land to which the Rules apply, former owners will, as a general rule, be given a first opportunity to repurchase the land previously in their ownership provided that its character has not materially changed since acquisition."[34]

Therefore, former owners or their successors in title are given a first opportunity to purchase the land when the purpose of acquisition ends.[35] In terms of the Rules, the property is to be sold to the qualifying former owner at the current market value as established by a professionally qualified valuation officer.[36] There are certain exceptions to this general rule that are discussed below.

However, since the Rules are non-statutory they frequently conflict with state departments' own policies concerning the disposal of land. Therefore, "there is much misunderstanding leading to inconsistent and often

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[31] Office of the Deputy Prime Minister *Compulsory Purchase and the Crichel Down Rules* Circular 06/2004 (31 October 2004). See also V Moore "Compulsory Purchase in the United Kingdom" in GM Erasmus (ed) *Compensation for Expropriation: A Comparative Study I* (1990) 1 4-5; R Gibbard "The Crichel Down Rules: Conduct or Misconduct in the Disposal of Public Lands?" in E Cooke (ed) *Modern Studies in Property Law II* (2003) 329 329. It should be noted that the origin of the Rules is particular to the United Kingdom, but basically the origin of the rules came as a result of public outcry (together with allegations of corruption and maladministration) when a property owner's request to re-purchase land that was compulsorily acquired for use during the Second World War was denied. For a more detailed account of the origin and development of the Crichel Down Rules, see Gibbard "The Crichel Down Rules" in *Modern Studies in Property Law II* 330; Department of Communities and Local Government *The Operation of the Crichel Down Rules* (2000) 3 1-3 5.

[32] "This Part of the Memorandum sets out the revised non-statutory arrangements ('Crichel Down Rules')"; "So far as local authorities and statutory bodies in England are concerned, it is recommended that they follow the Rules": Office of the Deputy Prime Minister *Compulsory Purchase and the Crichel Down Rules* 109 paras 1, 4.

[33] Office of the Deputy Prime Minister *Compulsory Purchase and the Crichel Down Rules* 109 paras 3, 4.

[34] 110 para 10.

[35] See Gibbard "The Crichel Down Rules" in *Modern Studies in Property Law II* 334. A successor in title is a successor in terms of a will and "includes those who would have succeeded by means of a second or subsequent will or intestacy": Office of the Deputy Prime Minister *Compulsory Purchase and the Crichel Down Rules* 119 para 10.

[36] Office of the Deputy Prime Minister *Compulsory Purchase and the Crichel Down Rules* 114 para 26.

inappropriate application of the Rules".[37] In view of the uncertainties and difficulties that arise due to the non-statutory nature of the Crichel Down Rules it is not advisable to adopt that approach. Rather, provision for re-transfer of expropriated property upon non-realisation of the public purpose should place a statutory obligation on the expropriating authority to follow a particular process when the purpose for which the property was expropriated cannot be realised, ends, or if it is subsequently abandoned. This process should also be activated when the expropriated owner reclaims the property upon the non-realisation or abandonment of the original purpose, or if the previous owner claims that the changed purpose is not a valid public purpose.

The issue of the lapse of time should be addressed clearly in the provisions that allow for the re-transfer of expropriated property upon non-realisation of the public purpose. The Expropriation Bill indicates that the Minister has to determine the time frame within which the juristic person must realise the purpose if the property was expropriated in terms of section 4 of the Bill. However, it is probably better that legislation should provide a general time frame for the realisation of the public purpose and allow the Minister to deviate from this time frame if a good reason exists. The general provision should state that if the purpose for which the property was expropriated had not been realised within a certain period, for instance three years, the state should file a new purpose. Notice of the new purpose could be served on the previous owner or be advertised in the *Government Gazette* and/or local newspapers. If a new purpose is not filed, the previous owner should be able to claim a right of repossession of the property. There are examples in foreign law of how such a time frame could be construed. In French law an owner can reclaim the property if it has not been used for the public purpose for a period of five years.[38] In Dutch law, an owner can reclaim the property after three years have lapsed and it has not been used for the intended purpose.[39] The time frame is something that has to be decided by the legislator, but it should be a relatively short period (three to five years) rather than a longer period, since the whole purpose of expropriation is to expropriate property that is required, many times on an urgent basis, for the realisation of a particular public purpose.

If the purpose for which the property was expropriated is abandoned or completed after the three year time period, the question as to what the state can do with the property arises. As a general rule, the expropriated property should always be used for a public purpose. Therefore, upon completion or abandonment of the public purpose, the state should be forced to follow a specific process. If the state department that initially needed the property for the fulfilment of a public purpose can use it for a different public purpose the state can retain possession of the property, since it would still be justified in doing so.[40] In that regard the state should file the new purpose, for instance

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37 Gibbard "The Crichel Down Rules" in *Modern Studies in Property Law II* 351.

38 *Harvey v Umhlatuze Municipality* 2011 1 SA 601 (KZP) para 93.

39 Art 61 of the *Onteigeningswet* of 1851. See also Sonnekus & Pleysier (2011) *TSAR* 619.

40 In this regard the Expropriation Bill acknowledges that the original public purpose may be substituted with a different public purpose. See s 4(3)(b).

by advertising it in the *Government Gazette*. If the previous owner contests the change of purpose, the courts should be able to decide whether the new purpose is a valid public purpose.

If the original state department cannot use the property for a different public purpose but it can be used for a valid public purpose by a different state department, the previous owner's right to reclaim the property should generally be excluded, provided that the proposed use by the different state department is also advertised in the *Government Gazette*.[41] However, if the previous owner argues that the purpose for which the different state department will use the property is not a valid public purpose, he should be able to approach a court to determine whether the property is still to be used for a valid public purpose. If the state department that initially required the property for a public purpose or a different state department cannot use the property for a different public purpose or if the court determines that the new purpose is not a valid public purpose, the previous owner should be given the first opportunity to purchase the land in order to take repossession of the property. The offer to repurchase should be made within a specific time period (for instance a year) after the state or a court has concluded that the property cannot be used for a different public purpose.

Therefore, when a new public purpose or public interest cannot be established and the state wants to dispose of the land, the legislation should force the expropriating authority to first offer the property to the previous owner or his successors in title.[42] In that sense, the price that has to be repaid should either be the current market value of the property, as is the case in terms of the United Kingdom's Crichel Down Rules, or the compensation that was originally paid plus legal interest.[43] The Expropriation Bill, if passed into law, would require the previous owner to pay the "prevailing market value" if she exercised her right of first refusal in terms of the isolated circumstances discussed above.[44] Given the argument below concerning the re-transfer

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[41] The Crichel Down Rules provide that if the compulsorily acquired land is needed by a different state department, the current department is not required to offer the property to the previous owner when the purpose for which the property was acquired ceases: Office of the Deputy Prime Minister *Compulsory Purchase and the Crichel Down Rules* 111 para 15 1. Furthermore, if the land is needed by a local authority or body with compulsory purchase power the current state department is not required to offer the property to the previous owner but on condition that the said body had the necessary authority at the time of acquisition to acquire the land: Office of the Deputy Prime Minister *Compulsory Purchase and the Crichel Down Rules* 111 para 15 2.

[42] In this regard the Bill recognises the owner's right of first refusal when the state wants to dispose of the property in the circumstances described above at part 2.

[43] In the Philippine decision of *Ouano v Mactan-Cebu International Airport Authority; Mactan-Cebu International Airport Authority v Inocian* GR No 168770; GR No 168812, 9 February 2011 the applicants reclaimed their previously expropriated property when the purpose of the expropriation could not be realised. The court held that the state no longer acquired unrestricted ownership of expropriated property. The transfer of property to the state as a result of expropriation is always conditional on it being used for the public purpose for which it was expropriated. Therefore, the applicants were successful in reclaiming the property and they had to repay the compensation initially received plus legal interest. (Although the right to reclaim expropriated property upon non-realisation of the public purpose developed in Philippine law on the basis of the assurances that were routinely given to expropriated owners in expropriation procedures, the decision shows that property should as a general rule only be used for the purpose for which it was expropriated). For a discussion of this decision see Van der Walt & Slade (2012) *SALJ* 231-233.

[44] S 4(12)(c) of the Bill.

of property that has materially changed since expropriation, the preference towards market value is probably the correct one.

In terms of the Crichel Down Rules, the state is under no obligation to offer the property to the previous owner upon the abandonment of the public purpose when the property has been changed materially, for instance through development.[45] The Rules state that property is deemed to have materially changed when buildings have been erected on land that was vacant when it was expropriated. Therefore, in the event that the state expropriates a vacant piece of land to build a hospital and in fact does so, but later the hospital falls into disuse because of a lack of funds, the state is under no obligation to offer the property to the previous owner.

However, it is arguable that the state could in that instance still offer the property to the previous owner, or his successors in title. If the price that has to be paid is market value, the owner will not be unduly favoured since he would have to pay for any improvements that might have been made to the property. There might be other instances where the state may be exempt from selling previously expropriated property, even to the previous owner. One example might include a nuclear electricity plant that was erected on expropriated land that fell into disuse. There may be a strong case not to sell the property since it may contain hazardous waste. If the property has been developed for or is usable for land reform purposes, the expropriating authority may also be exempt from offering the property to the previous owner, since the expropriation of property for land reform purposes is in the public interest.

The law as it stands states that the state is only allowed to use expropriated property for a public purpose.[46] What should happen when the state no longer has a need for the property and the previous owner rejects the offer to re-purchase the land? It is arguable that in this case, and in only this case, the state is able to deal with the property as if it held it in private ownership. In this instance, the public purpose probably has played its part and has rendered enough protection to the expropriated owner. It has ensured that the original expropriation was for a public purpose and it has given the expropriated owner the opportunity to reclaim the property when the property could no longer be used for a valid public purpose. In that regard the state can freely dispose of the property in any manner it deems fit.

Detailed legislation is required to resolve the issue that arose in the *Harvey* decision. The main objective of the amending provisions should be to indicate the nature of this right of re-transfer; the persons entitled to claim re-transfer; the time-frame within which the expropriated owner can reclaim the property upon the non-implementation of the purpose; calculation of the amount that

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[45] This includes instances where buildings have been erected on previously bare land or where additions to existing buildings were made that altered the character of the land. Temporary buildings will not necessarily constitute a material change and in evaluating whether development had materially changed the land, the relevant state department should consider the cost of restoring the land to its original state. In the event that a portion of the land had been materially changed, the portion that was not materially changed can be offered to the previous owner: Office of the Deputy Prime Minister *Compulsory Purchase and the Crichel Down Rules* 110 paras 10-11.

[46] See Van der Walt *Constitutional Property Law* (2011) 499; Du Plessis (2011) *TSAR* 590-592.

has to be paid for re-transfer; as well as the circumstances under which the state would not be required to re-transfer the property to the previous owner. In that regard the state would be prevented from changing the purpose for which expropriated property is used at its own discretion. It would also prevent the state from using a valid public purpose as a smokescreen to use the property for a different purpose after the property has been expropriated.

SUMMARY

In *Harvey v Umhlatuze Municipality* 2011 1 SA 601 (KZP) ("*Harvey*") the High Court had to decide whether it was competent to order the re-transfer of expropriated property to the previous owner when the purpose for which the property was expropriated could not be realised. The court refused to order the re-transfer of the property due to the absence of legislation that authorises the Court to re-transfer expropriated property upon the non-realisation of the purpose of the expropriation. In March 2013, a draft Expropriation Bill was released for public comment. This note shows that the Expropriation Bill, if passed into law, does not address the issue that was present in *Harvey*, but only allows for the re-transfer of previously expropriated property in very limited circumstances.

Since the Expropriation Bill does not effectively address the issue that was present in *Harvey*, recommendations are made that should resolve the issue that was present in that decision. The main objective of the amending provisions should be to indicate the nature of the right of re-transfer, the persons entitled to claim re-transfer, the time-frame within which the expropriated owner can reclaim the property upon non-implementation of the purpose, setting up a framework for calculating the amount that has to be repaid, as well as the circumstances under which the state would not be required to re-transfer the property to the previous owner.

Including detailed legislation that effectively resolves the issue in *Harvey v Umhlatuze Municipality*, the state would be prevented from changing the purpose for which expropriated property is used at its own discretion. It would also prevent the state from using a valid public purpose as a smokescreen to use the property for a different purpose after the property has been expropriated.